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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CITY OF MONROVIA, Plaintiff and Respondent, v. PAULINE WHITE, Defendant and Appellant.	B282713 (Los Angeles County Super. Ct. No. EC060809)

APPEAL from an order of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed.

Pauline White, in pro. per., for Defendant and Appellant.

Dapeer, Rosenblit & Litvak, William Litvak and Eric P. Markus for Plaintiff and Respondent.

Defendant and appellant Pauline White (White) appeals from an order awarding plaintiff and respondent City of Monrovia (City) $102,669 in attorney fees incurred in White's prior consolidated appeals from orders denying her special motion to strike, pursuant to Code of Civil Procedure section 425.16,[1] the City's complaint; granting the City's anti-SLAPP motion and striking most of the causes of action in White's cross-complaint against the City; and awarding the City attorney fees as the prevailing party on the anti-SLAPP motions. We affirm the order awarding the City its attorney fees on appeal.

BACKGROUND

Underlying anti-SLAPP and attorney fees motions

The City commenced this action on May 31, 2013, seeking to enjoin allegedly unpermitted grading and construction activities on White's property. White cross-complained against the City, alleging 21 causes of action, including trespass and abuse of process. The City filed an anti-SLAPP motion to strike all 21 causes of action, and on November 30, 2013, the trial court granted the motion, striking the cross-complaint in its entirety. The City moved to recover attorney fees it incurred in bringing the anti-SLAPP motion, and the trial court granted the motion, awarding the City $12,600 in attorney fees.

White in turn filed an anti-SLAPP motion seeking to strike the City's complaint against her. The trial court denied that motion and imposed monetary sanctions against White for filing a frivolous motion. The City moved to recover attorney fees incurred in successfully opposing White's anti-SLAPP motion,

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[1] All further statutory references are to the Code of Civil Procedure. A special motion to strike under section 425.16 is commonly referred to as an anti-SLAPP motion. SLAPP is an acronym for strategic lawsuit against public participation.

and the trial court granted that motion and awarded the City $11,522.50 in attorney fees.

White appealed from the orders granting the City's anti-SLAPP motion, denying her anti-SLAPP motion, and awarding the City its attorney fees. Those appeals were subsequently consolidated.

We affirmed the order denying White's anti-SLAPP motion and affirmed in part and reversed in part the order granting the City's anti-SLAPP motion, holding that five of the 21 causes of action asserted in White's cross-complaint did not come within the ambit of the anti-SLAPP statute. (*City of Monrovia v. White* (May 31, 2016, B254080) [nonpub. opn.] (*Monrovia I*).) We also affirmed the order awarding the City its attorney fees on the anti-SLAPP motions, and summarily denied White's petition for rehearing. (*Ibid.*) White then filed a petition for review, which the California Supreme Court denied on August 17, 2016. On September 26, 2016, this court filed its remittitur, which awarded the City its costs on appeal.

City's motion for attorney fees on appeal

On November 4, 2016, the City filed a motion to recover its attorney fees on appeal. The motion was supported by the declaration of the City's retained counsel, William Litvak, attesting to the hours spent and the hourly billing rates of the attorneys who litigated White's prior appeals. Litvak's initial declaration did not include a verification stating that it was true under penalty of perjury under California law, and White objected to the declaration on that ground, among others. The City thereafter filed, on February 10, 2017, a notice of errata and correction to the Litvak declaration stating that the verification under penalty of perjury had been inadvertently omitted from the previously filed declaration. An accompanying amended declaration corrected that omission.

The hearing on the attorney fees motion was originally set for February 24, 2017. Prior to that date, the Honorable William D. Stewart[2] issued a written tentative ruling awarding the City attorney fees in the amount of $102,699. The hearing was subsequently continued, on the trial court's own motion, to March 17, 2017.

At the March 17, 2017 hearing, Judge Stewart decided five motions filed by the parties, including the City's motion for attorney fees on appeal.[3] Judge Stewart briefly referenced his tentative rulings and then invited oral argument. More than an hour of oral argument, primarily from White, ensued. White argued that this court's decision in her prior consolidated appeals, *Monrovia I*, was erroneous and that the trial court was not bound by that decision; that the City had no standing to file its complaint through private counsel; and that the City was not entitled to record a lis pendens against White's property. White also claimed there were errors in Judge Stewart's written tentative rulings.

During the hearing, White's insistence on advancing erroneous legal arguments, her disregard of Judge Stewart's admonishments, and her unwillingness to accept the court's rulings increasingly taxed Judge Stewart's patience. Two examples are illustrative. When arguing against the City's

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[2] This case was assigned to Judge Stewart after White filed a peremptory challenge under section 170.6 to Judge Donna Fields Goldstein, the judicial officer who decided the underlying anti-SLAPP and attorney fees motions in favor of the City.

[3] The other four motions were a demurrer to White's cross-complaint, a motion for leave to amend the cross-complaint, a motion to dismiss the City's complaint and to expunge a lis pendens recorded on White's property, and a motion for relief from failure to file a motion to tax costs.

demurrer to the remaining causes of action in her cross-complaint, White insisted that this court's judgment in *Monrovia I* was incorrect, and ignored Judge Stewart's repeated admonitions that he was bound by that judgment. White insisted that this court's determination that her cross-complaint failed to allege compliance with the Government Claims Act "was wrong and [the trial] court is not bound by an erroneous statement of the Court of Appeal." Judge Stewart responded: "I disagree with that. Whatever [the Court of Appeal] say[s] in this respect is law on the case."

Immediately after this exchange, White proceeded to make the same argument Judge Stewart had just rejected:

> "MS. WHITE: . . . So going back to that, there was in fact a timely government claim presented and denied, which the City knows about because they obviously denied it.
>
> "THE COURT: Did the Court of Appeal hold that way?
>
> "MS. WHITE: I beg your pardon, your Honor?
>
> "THE COURT: Did the Court of Appeal hold that way?
>
> "MS. WHITE: Hold which way, your Honor?
>
> "THE COURT: What you just said.
>
> "MS. WHITE: Well, they made a mistake . . . .
>
> "THE COURT: I can't consider that . . . ."

Judge Stewart then sustained the City's demurrer to White's cross-complaint.

Later in the hearing, White repeatedly argued that there were errors in the trial court's tentative ruling denying her motion to expunge the lis pendens the City had recorded against her property. After Judge Stewart rejected White's position and adopted the tentative ruling, White persisted in attacking that ruling and ignored his admonishments to move on:

> "THE COURT: The court adopts -- the court adopts its tentative ruling on the motion to expunge. Now we're on --
>
> "MS. WHITE: But, but, your Honor, one quick point before you leave that.
>
> "THE COURT: No, I've left it. I've left it.
>
> "MS. WHITE: Well, actually, two quick points because --
>
> "THE COURT: I've left it. It's ruled. It's ruled on.
>
> "MS. WHITE: Your Honor --
>
> "THE COURT: It's ruled on.
>
> "MS. WHITE: I would just say that in the --
>
> "THE COURT: It's ruled on. We have to go to the next one now.
>
> "MS. WHITE: The court's tentative doesn't even seem to adopt or to have considered my reply, and I talked about in personam versus in rem. I talked about the lack of sanctions, so --
>
> "THE COURT: It was all considered.

> "MS. WHITE: Well, it's not even mentioned in the tentative, your Honor.
>
> "THE COURT: They don't mention everything.
>
> "MS. WHITE: It's feeling a little bit like I'm just kind of getting shoved through the system with the idea that, oh, take it up to the Court of Appeal."

By the time White argued that the City was not entitled to recover its attorney fees on appeal, Judge Stewart's patience had been exhausted. He rejected White's arguments that the City's attorney fees motion was a claim for damages, that the attorney fees award was not authorized by any statute, and that the motion was unsupported by a properly sworn declaration under penalty of perjury. When the City pointed out that it had filed, on February 10, 2017, an amended declaration correcting its inadvertent omission of the verification under penalty of perjury, and White conceded she had filed nothing in response to the amended declaration, Judge Stewart concluded that White had not been prejudiced by the City's amended submission because she could have responded to the amended declaration any time before the March 2017 hearing date, but had elected instead to "wing it." When White continued to argue the point, Judge Stewart lost his patience, noting that the case had consumed an entire law and motion calendar, that it appeared that White was intent on delaying the trial, and that such delay was in no one's interest. Judge Stewart then stated: "You know, I just might disqualify myself from being prejudice[d], but I'm trying to put that aside, Ma'am. You are not performing as a proper attorney in this court's opinion. You are representing yourself, but, remember, you're an attorney, too, and I'm considering reporting you to the State Bar." Judge Stewart then concluded the hearing and adopted all of his tentative rulings. When White continued

to interrupt, Judge Stewart reiterated his intention to report her to the State Bar "for unnecessary litigation, for improper performance, for everything else I can think of." Judge Stewart then left the bench, at which point White asked him to recuse himself. Judge Stewart did not respond to White's request.

After the hearing, Judge Stewart issued a minute order in which he reiterated his oral rulings. The minute order further states: "OUT OF THE PRESENCE OF COUNSEL: [¶] . . . [¶] The Judge disqualifies himself from further proceedings on this case." This appeal followed.

CONTENTIONS ON APPEAL

White contends the order awarding the City its attorney fees must be reversed because (1) the order is void because Judge Stewart was disqualified; (2) the City's attorney fees motion was not supported by a properly sworn declaration; (3) the City cannot recover fees paid to private counsel; (4) no statute authorizes the fee award; (5) the City was not entitled to fees as a prevailing party; and (6) the amount of fees awarded was excessive.

DISCUSSION

I. Disqualification

Section 170.1, subdivision (a)(6) provides that a judge shall be disqualified if "[t]he judge believes there is a substantial doubt as to his or capacity to be impartial," or "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." The latter of these two grounds "involves an objective test whether a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality. [Citation.]" (*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319.) On undisputed facts, whether a reasonable member of the public at large would

entertain such doubt is a question of law subject to independent review. (*Ibid.*)

We reject White's contention that Judge Stewart was disqualified from ruling on the City's motion for attorney fees because he was biased and prejudiced against her. The evidence of Judge Stewart's alleged bias -- statements he made at the conclusion of the hearing that he might disqualify himself and that he intended to report White to the State Bar, and statements made during the hearing that purportedly conveyed disdain for White's position -- reflect Judge Stewart's increasing exasperation with White's insistence on advancing erroneous legal arguments and her unwillingness to accept the trial court's rulings.

By the time White argued that the City was not entitled attorney fees on appeal as the prevailing party on the underlying anti-SLAPP motions, Judge Stewart had exhausted his patience, culminating in his remarks that he might disqualify himself and that he was considering reporting White to the State Bar. Immediately thereafter, he adopted all of his tentative rulings, including the ruling on the City's motion for attorney fees, and concluded the hearing. White disregarded Judge Stewart's rulings and his conclusion of the proceedings and continued to interrupt and challenge him, prompting Judge Stewart to reiterate, several times, his intention to report her to the State Bar.

Judge Stewart's remarks, viewed in context, do not support White's bias claim. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." (*Liteky v. United States* (1994) 510 U.S. 540, 555 (*Liteky*).) Such remarks "*may* do so if they reveal an opinion that derives from an extrajudicial source; and they

will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." (*Ibid.*) Judge Stewart's comments were not based on any extrajudicial source. His initial statement that he was considering reporting White to the State Bar was made after White persisted in advancing meritless arguments that the City's attorney fees motion was not authorized by statute and was not supported by a properly sworn declaration. Remarks that do not establish bias or partiality "are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as . . . judges, sometimes display." (*Id.* at pp. 555-556.) ""[I]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior." [Citation.] Indeed, "[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the party] a fair, as opposed to a perfect, trial.'" [Citation.]" (*Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525, 536-537.) The record, when viewed in its entirety, does not support the conclusion that Judge Stewart's behavior denied White a fair hearing.

Judge Stewart's repetition of his stated intention to report White to the State Bar, made after he had adopted all tentative rulings and in response to White's continued attempts to challenge those rulings, do not demonstrate that he was incapable of making a fair judgment. The tentative ruling on the attorney fees motion was issued in February 2017, nearly a month before Judge Stewart heard White's arguments at the

March 17, 2017 hearing and adopted that ruling at the conclusion of the hearing. The ruling itself does constitute a valid basis for White's claim of bias or partiality. (*Liteky, supra,* 510 U.S. at p. 555 [judicial rulings "are proper grounds for appeal, not for recusal"].)

We reject White's contentions, raised for the first time in her late-filed reply brief, that her request for recusal, made after Judge Stewart adopted all of his tentative rulings, was an oral motion to disqualify Judge Stewart pursuant to Code of Civil Procedure section 170.6, and that Judge Stewart's subsequent written order recusing himself from further proceedings in the case conceded that White's purported motion to disqualify was warranted.[4]

Judge Stewart's subsequent written order, issued after the conclusion of the hearing and out of the presence of counsel, disqualifying himself from further proceedings in this case, did not preclude him from ruling on the City's attorney fees motion at the conclusion of the March 17, 2017 hearing. Section 170.4, subdivision (d) provides that "a disqualified judge shall have no power to act in any proceeding *after* his or her disqualification or *after* the filing of a statement of disqualification until the question of his or her disqualification has been determined." (Italics added.) In this case, Judge Stewart made his rulings before disqualifying himself from further proceedings in the case.

A reasonable observer could conclude that White advanced arguments that lacked merit, that she failed to heed Judge Stewart's admonishments or to accept his rulings, and that Judge

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[4] We disregard White's argument, raised for the first time in her reply brief, that Judge Stewart's purported disqualification invalidated his rulings on the other four motions he decided at the March 17, 2017 hearing. (*Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388.)

Stewart lost patience with her, as evidenced by his testy remarks. Those remarks, while unfortunate, did not disqualify him from ruling on the attorney fees motion. (*Liteky, supra,* 510 U.S. at p. 551.)

II Declaration in support of attorney fees motion

White's challenge to the sufficiency of the evidence supporting the attorney fees award is premised solely on the defective Litvak declaration, filed by the City in November 2016, that inadvertently omitted a verification stating that it was true under penalty of perjury under California law. The City corrected that inadvertent omission by filing a notice of errata and an amended declaration in February 2017. White was served with a copy of the notice and the amended declaration, but she filed nothing in response.

Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal.4th 601, on which White relies to support her position, is inapposite. In that case, summary judgment was entered against a plaintiff whose opposing declaration was deemed inadmissible because it failed to state that it was executed under penalty of perjury under the laws of the State of California. (*Id.* at pp. 606-607.) The plaintiff never sought, at any time before or during the hearing on the summary judgment motion, to amend the defective declaration. Here, the City filed an amended declaration more than one month before the hearing on its attorney fees motion. White had ample time in which to respond to the amended declaration, but she did not do so.

We reject White's arguments that the City's amended declaration should be disregarded because it should have been filed pursuant to a noticed motion and that the filing of the amended declaration was an attempt to "sandbag" her. White fails to establish that the trial court's acceptance of the revised declaration was arbitrary, capricious, or patently absurd.

(*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919.) She also fails to demonstrate how she was prejudiced by the trial court's acceptance of the revised declaration. (See *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1204.)

III. City's use of private counsel

The City was not precluded from retaining private counsel to prosecute its public nuisance action against White. Contrary to White's assertion, *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*) does not prohibit the City from doing so. In that case, the California Supreme Court held that the City of Corona could not retain outside counsel, on a contingency fee basis, to prosecute a public nuisance action against an adult bookstore. (*Id.* at pp. 747-748.) The high court reasoned that the city's contingent fee arrangement with a private attorney was inappropriate because it gave the attorney a financial interest in the outcome of the case and was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750.)

The City's attorneys in this case were not retained on a contingency fee basis, as is evident from the billing statements and declaration in support of the City's motion for attorney fees. *Clancy* accordingly is inapposite.

IV. Statutory authority for attorney fees award

White's argument that no statute authorizes the attorney fees award is without merit. The order awarding the City its attorney fees as the prevailing party in White's consolidated appeals from the City's anti-SLAPP motion, her anti-SLAPP motion, and attorney fees awarded to the City in litigating the anti-SLAPP motions in the trial court is authorized by section 425.16, subdivision (c).

Under section 425.16, subdivision (c), "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." "'A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise.' [Citation.]" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.) Section 425.16, subdivision (c) provides that a prevailing defendant is entitled to recover attorney fees and costs, and does not preclude recovery of attorney fees on appeal. (*Dove Audio*, at p. 785.) The trial court accordingly had statutory authority to award the City its reasonable attorney fees on appeal.

V. City as the prevailing party on appeal

White's argument that the trial court lacked authority to award appellate attorney fees because this court awarded only appellate costs, and not attorney fees, to the City in the prior appeal is equally without merit. That our judgment in *Monrovia I* awarded the City costs on appeal, but not attorney fees, has no bearing on the City's entitlement to attorney fees incurred in the prior appeal. (Cal. Rules of Court, rule 8.278(d)(2); *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 925-928 (*Butler-Rupp*).) "[A] decision about the entitlement to costs on appeal is entirely separate from a decision about the entitlement to attorney fees on appeal. [Citations.]" (*Butler-Rupp*, at p. 927.) Rule 8.278(d)(2) of the California Rules of Court states that "[u]nless the [Court of Appeal] orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." The City properly requested its appellate attorney fees in the trial court and demonstrated its entitlement to such fees under the anti-SLAPP statute. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; *Butler-Rupp, supra*, at p. 927.)

White's arguments that the City lacked standing to bring its enforcement action against her, that the City's action fell outside the ambit of the anti-SLAPP statute, and that this court's prior judgment in *Monrovia I* was in error are all barred under principles of res judicata. (*Mueller v. J .C. Penney Co.* (1985) 173 Cal.App.3d 713, 719.) These arguments could or should have been made in White's petition for review by the Supreme Court and are not valid grounds for the current appeal.

VI. Amount of fee award

White fails to demonstrate any abuse of discretion by the trial court in the amount of attorney fees awarded. (*Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 544 [amount of attorney fees award reviewed for abuse of discretion].) The amount of an attorney fee award under section 425.16 is computed by the trial court in accordance with the "lodestar" method. (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 491.) Under that method, the trial court tabulates the attorney fee lodestar by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The purpose of the lodestar method "is to fix a fee at the fair market value for the particular action." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.)

The record shows that that the trial court applied the lodestar method in determining that the City was entitled to $102,669 in attorney fees, based upon a total of 238.8 hours spent by the City's attorneys in responding to White's prior consolidated appeals, her petition for rehearing, the subsequent petition for review, and in preparing for appearing at the hearing on the City's motion for attorney fees. The trial court specifically found the hourly rates charged by the City's attorneys to be reasonable.

White contends the attorney fee award should have been based solely on the hourly rates actually billed to the City under its contract with its attorneys; however, "[t]here is no requirement that the reasonable market rate mirror the *actual* rate billed." (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 701-702.) "'The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. [Citations.] This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel. [Citations.]' [Citation.]" (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1260; accord *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 619.)

Howell v. Hamilton Meat & Provisions, Inc. (2011) 52 Cal.4th 541 and *Oliver v. Campbell* (1954) 43 Cal.2d 298, on which White relies to support her position, are inapposite. *Howell* involved application of the collateral source rule and recovery of past medical expenses in a personal injury action. *Oliver* involved an attorney suing in quantum meruit after being discharged by a former client. Neither case involved determination of an attorney fee award using the lodestar method.

White claims this court's judgment in *Monrovia I* limited the City's entitlement to attorney fees incurred only in connection with the appeal of her anti-SLAPP motion, and not the City's anti-SLAPP motion or the attorney fees awarded to the City in litigating the anti-SLAPP motions in the trial court. As previously discussed, our judgment in *Monrovia I* has no bearing on the City's entitlement to attorney fees incurred in connection with that prior appeal. (Cal. Rules of Court, rule 8.278(d)(2); *Butler-Rupp, supra,* 154 Cal.App.4th at pp. 925-928.)

White further claims the trial court erred by awarding the City all of the fees it incurred on its anti-SLAPP motion because that motion did not strike all of the causes of action in her cross-complaint. She argues that the award must be limited to fees the City incurred only in connection with the causes of action actually stricken. Our judgment in *Monrovia I* reversed in part the order granting the City's anti-SLAPP motion as to five of the 21 causes of action White asserted in her cross-complaint. (*Ibid.*) The trial court determined that the City's anti-SLAPP motion, which struck approximately 76 percent of the causes of action in White's cross-complaint, was sufficiently successful for the City to be determined the prevailing party on appeal. That determination was not an abuse of discretion. (*Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 59 [trial court has wide discretion in determining which party has prevailed on its causes of action and that determination will not be disturbed absent a clear abuse of discretion].)

DISPOSITION

The order awarding the City its attorney fees is affirmed. The City is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT